To Our Clients and Friends:

On August 22, 2012, the SEC's Division of Trading and Markets (the "Staff") released Frequently Asked Questions ("FAQs") providing the Staff's views on provisions of the Jumpstart Our Business Startups Act ("JOBS Act") relating to research analysts and underwriters. The FAQs is available here: http://www.sec.gov/divisions/marketreg/tmjobsact-researchanalystsfaq.htm.

The FAQs convey the Staff's views with respect to a number of issues, including:

- research analyst communications under JOBS Act Section 105(b), in particular that investment firms not subject to the Global Research Settlement may include analysts in pitch meetings and sales force presentations;

- "test the waters" provisions under JOBS Act Section 105(c), in particular that banks may obtain information from customers about the number of shares they might purchase at various price levels in a EGC offering prior to filing a registration statement so long as they do not create any type of obligation; and

- post-offering communications under JOBS Act Section 105(d), in particular that publication or distribution of a research report, or public appearances with respect to, an EGC's securities should be possible before or after the end of an SRO-imposed quiet period, whether such quiet period ends by termination, expiration, or waiver, or before or after the end of an SRO-imposed quiet period after a secondary offering of the EGC's securities.

While the FAQs do not constitute rules, regulations or statements of the SEC, they provide useful written guidance to practitioners. Practices in the areas addressed by the FAQs will continue to evolve in response to the JOBS Act and now the FAQs.

Research Analyst Communications

The JOBS Act prohibits the SEC and any national securities association (i.e., the Financial Industry Regulatory Authority, or FINRA) from adopting or maintaining rules that restrict an employee of a broker, dealer or FINRA member from arranging a communication between a securities analyst and a potential investor based on such person's "functional role" (e.g., investment banker) in connection with an initial public offering of common equity of an emerging growth company (an "EGC", as defined under the JOBS Act).

The JOBS Act also prohibits the adoption or maintenance of rules that restrict a securities analyst's participation in communications with management in connection with an initial public offering of
common equity of an EGC that also are attended by an investment banker or other employee of a FINRA member who is not a securities analyst.

These changes left significant uncertainty regarding how the new provisions would interact with various SEC and self-regulatory organization ("SRO") rules, as well as the 2003 settlement between many large investment banks and the SEC, SROs, and other regulators regarding research analyst conflicts of interest (the "Global Research Settlement"). In the FAQs, the Staff has provided its views on several of these issues.

A. The JOBS Act and the Global Research Settlement

The Staff confirmed that the JOBS Act does not supersede, amend or modify the Global Research Settlement. As a result, a divergence in practice may develop between settling and non-settling firms. For example, as discussed further below, non-settling firms may modify their practices to allow research analysts to attend pitch meetings and appear at sales force presentations that are also attended by investment banking personnel. Absent future changes to the Global Research Settlement, however, settling firms will continue to be precluded from engaging in these practices since, absent an express exception to the Global Research Settlement requirement imposed on the settling firms to create and enforce firewalls between research and investment banking (for example, the exception permitting chaperoned joint due diligence meetings), analysts from settling firms are not permitted to participate in communications in the presence of investment banking personnel. In addition, non-settling firms may also adhere voluntarily to Global Research Settlement restrictions, including firewalls, either as a "best practices" measure or at the request of investors or customers.

The FAQs note that settling firms seeking to amend the Global Research Settlement must apply to the court, and the SEC may recommend or oppose such an amendment based on its assessment of whether the proposed amendment is in the public interest. The Staff also noted that, as provided in the Global Research Settlement, the SEC can amend the Global Research Settlement if the SEC adopts a rule (or approves an SRO rule) with the stated intent of superseding the relevant provision(s) of the Global Research Settlement.

B. Arranging Activity Under the JOBS Act

The Staff expressed its view that no existing SEC or SRO rules prohibit the conduct permitted by Section 105(b) of the JOBS Act. Accordingly, analysts may (1) contact clients whose names they have been sent by investment bankers at the analyst's own discretion and with appropriate controls, (2) forward lists of potential clients with whom they intend to communicate to investment banking personnel to facilitate scheduling, and (3) participate in calls with clients that have been arranged by investment bankers (though investment bankers themselves may not participate in such calls).

The Staff pointed out that NASD Rule 2711(c)(6) and NYSE Rule 472(b)(6)(ii) continue to prohibit investment banking personnel from directing analysts to engage in sales or marketing efforts, and from directing analysts to engage in communications with current or prospective customers regarding investment banking services. While it is the view of the Staff that these rules do not prohibit the arranging activity described above, the Staff cautioned that the JOBS Act did not change other SEC or SRO rules applicable to research analysts, such as the obligation to assure that communications with
current or prospective clients regarding an investment banking services transaction be fair, balanced, and not misleading based on an overall view of the context of the communication. The Staff also cautioned that firms subject to the Global Research Settlement need to be mindful of the requirements of Global Research Settlement, including the requirement to create and enforce firewalls between research and investment banking personnel reasonably designed to prohibit all communications between the two except as expressly permitted by the terms of the Global Research Settlement. The Staff also cautioned that firms need to have appropriate policies and procedures to ensure compliance with the federal securities laws and SRO rules.

C. Analyst Participation in IPO-related EGC Meetings with Company Personnel and Investment Bankers

Section 105(b) of the JOBS Act provides that analysts may participate in IPO-related communications with EGC management that are also attended by non-analyst personnel of a broker, dealer, or national securities association member, including investment banking personnel. The Staff said that it interprets Section 105(b) as primarily reflecting a Congressional intent to allow analysts to participate in emerging growth company management presentations with sales force personnel so that the issuer's management would not need to make separate and duplicative presentations to analysts at a time when senior management resources are limited. In addition, the Staff acknowledges in the FAQs that Section 105(b) would also allow analyst attendance at pitch meetings for an IPO and involving EGC management. This new flexibility does not extend to meetings with EGC management at which investors are also present.

The Staff cautioned that the JOBS Act does not alter other existing SRO prohibitions. These include rules prohibiting analysts from (1) changing their research as a result of a communication in an effort to obtain investment banking business, (2) giving "tacit acquiescence" to overtures from EGC management that the issuer expects favorable research coverage in exchange for investment banking business, such as underwriting the EGC's IPO, (3) providing views inconsistent with their personal views, and (4) making misleading statements. SRO rules also prohibit investment banking personnel from directing analysts to engage in sales or marketing efforts related to an investment banking services transaction, and also bar analysts from directly or indirectly soliciting investment banking business.

Because the JOBS Act does not affect the Global Research Settlement, Global Research Settlement firms cannot, without an amendment to the settlement, take advantage of Section 105(b)'s provisions to permit research analysts from participating in these kind of joint sales force presentations or pitch meetings.

On the other hand, firms that are not a party to the Global Research Settlement may now permit analyst attendance at such meetings in respect of an IPO and involving EGC management, including pitch meetings. As discussed further below, this new flexibility does not extend to meetings with EGC management at which investors are also present. As examples of the types of activity that non-Global Research Settlement firms can now engage in, the Staff indicated that:
(i) before a firm is formally retained to underwrite an EGC IPO, a research analyst from that firm could attend a meeting at which both EGC management and investment bankers are present and introduce themselves, outline their research program and the types of factors that the analyst would consider in their analysis of a company, and ask factual follow-up questions of management to better understand factual statements made by the EGC's management; and

(ii) after the firm is retained to underwrite the EGC IPO, the research analyst could participate in an educational presentation by EGC management directed at a firm's sales force, provide information obtained from investing customers, and communicate his or her views to the sales force.

The Staff noted that these examples are not exhaustive of the types of activity permitted by Section 105(b). However, investment banking firms need to be mindful that investment banking personnel remain prohibited from directly or indirectly directing a research analyst to engage in sales or marketing efforts related to an investment banking services transaction, and need to ensure that they have instituted and enforce appropriate controls to make sure that analysts are not engaging in prohibited conduct, such as solicitation, at any meetings with EGC management that are also attended by investment banking personnel, or otherwise.

D. Analyst Participation in Roadshows and Other Communications with Investors

In the FAQs, the Staff articulated its view that Section 105(b) of the JOBS Act only addresses analyst participation in IPO-related communications between EGC management and investment banking personnel, and does not address communications where investors are also present. Accordingly, the Staff stressed that Section 105(b) does not affect NASD Rules 2711(c)(5)(A) and (B) and NYSE Rules 472(b)(6)(i)(a) and (b), prohibiting analyst participation in roadshows and other communications with customers about an investment banking transaction in the presence of investment banking personnel or company management.

Interaction Between "Testing the Waters" Provisions and Rule 15c2-8(e)

The JOBS Act amended Section 5 of the Securities Act to allow EGCs or persons acting on their behalf to "test the waters" by communicating orally or in writing with qualified institutional buyers or institutional accredited investors (each as defined under Securities Act rules) both prior to and following the filing of a registration statement. Following enactment of the JOBS Act, questions arose as to the interplay between the "test the waters" provisions of Section 105(c) and Exchange Act Rule 15c2-8(e). Rule 15c2-8(e) requires a broker or dealer, after the filing of a registration statement, to provide a preliminary prospectus prior to any solicitation of orders from a customer. If "testing the waters" constitutes solicitation under Rule 15c2-8(e), then JOBS Act Section 105(c) would be of limited practical use since a prospectus may not be available at the time of such communications.

The FAQs express the Staff’s view that the JOBS Act has no effect on the meaning of "solicit customer orders" under Rule 15c2-8(e), and that "testing the waters" as contemplated by the JOBS Act can be accomplished in a manner that complies with Rule 15c2-8(e). Whether an activity counts as "soliciting customer orders" depends on the relevant facts and circumstances. However, the Staff offered its view that, in general, "if an underwriter is requesting from a customer a non-binding indication of interest
that includes the amount of shares the customer might purchase in the potential offering at particular price levels - but does not ask the customer to commit to purchase the relevant securities - the underwriter, absent other factors, would likely not be soliciting a customer order for purposes of Rule 15c2-8(e)."

The Staff also noted that Rule 15c2-8 only applies after a registration statement has been filed. The confidential submission of a draft registration statement under Section 106(a) of the JOBS Act is not a "filing" of a registration statement under Rule 15c2-8.

As a result of the Staff clarifying its views with respect to Rule 15c2-8, EGCs and their underwriters should have significant latitude to engage in "test the waters" communications without fear of violating Rule 15c2-8, including specifically obtaining information from customers about the number of shares they might purchase at various price levels so long as obtaining that information does not create any type of obligation.

Post-Offering Communications

Section 105(d) of the JOBS Act allows the publication or distribution of research reports or public appearances with respect to an EGC's securities at any time after an IPO or prior to the expiration date of any lock-up agreements. In the FAQs, the Staff gives a broad reading to Section 105(d).

A. Section 105(d) and SRO Rules on Quiet Periods Before Lock-Ups Expire

The FAQs express the Staff's view that Section 105(d) is intended to apply to SRO-imposed quiet periods before lock-ups end irrespective of their manner of ending. In other words, it is the Staff's view that whether a lock-up concludes by termination, expiration or waiver, Section 105(d) applies to the quiet periods under NASD Rule 2711(f)(4) and NYSE Rule 472(f)(4), and should permit publication or distribution of research and public appearances with respect to an EGC's securities prior to the end of any lock-up.

B. Rule 105(d) and Other SRO-Imposed Quiet Periods

The FAQs also express the Staff's view that, although Section 105(d) does not expressly permit publication or distribution of a research report or public appearances with respect to an EGC's securities after expiration of a lock-up agreement, it should be read to permit such publication, distribution, and public appearances during these periods (again, irrespective of whether the lock-up ends by termination, expiration, or waiver). Similarly, while Section 105(d) does not specifically address quiet periods after a secondary offering of an EGC, the Staff expressed the view that it should apply to such periods. The Staff stated in the FAQs that it believes that the policies underlying the change in Section 105(d) are equally applicable to quiet periods during these other time periods.

C. Expected FINRA Rule Changes

The Staff stated in the FAQs that FINRA is contemplating a proposal to the SEC to eliminate remaining quiet periods imposed by NASD Rules 2711(f)(1), (2), and (4) and NYSE Rules 472(f)(1) through (4) for offerings of EGC securities. The Staff indicated that it believes that such changes will
eliminate the quiet periods applicable to EGCs discussed above that are not addressed by Section 105(d).

**Section 105 and Other SEC and SRO Rules**

The FAQs also clarified the Staff's view of the interaction between Section 105 of the JOBS Act and a number of other SRO and SEC rules.

- The Staff offered its view that JOBS Act Section 105(b) and 105(d) are intended to apply to NYSE Rule 472 to the same extent as to NASD Rule 2711.

- The FAQs stated that the JOBS Act does not affect the application of SRO rules regarding the supervision, compensation, or evaluation of analysts (specifically, NASD Rules 2711(b)(1) and (d), and NYSE Rules 472(b)(1) and (h)); SRO rules regarding pre-publication review of research reports by non-research personnel or an EGC (specifically, NASD Rules 2711(b)(2), (b)(3), (c)(1) and (c)(2), and NYSE Rules 472(b)(2), (b)(3), and (b)(4)); or SRO rules prohibiting firms from promising favorable research in exchange for the business of or compensation from an EGC (specifically, NASD Rule 2711(e) and NYSE Rule 472(g)(1)).

- The definition of "research report" under the JOBS Act does not affect the analysis of what constitutes a research report under Regulation Analyst Certification ("Regulation AC").

- The JOBS Act does not otherwise affect Regulation AC, which, in general, requires that brokers, dealers, and certain associates of brokers or dealers make various certifications in research reports regarding the views expressed in those reports and analysts' potential conflicts of interest due to compensation.

- The JOBS Act does not impact any of the requirements under NASD Rule 2210, relating to the content, filing, and approval of communications with the public.

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An abbreviated version of this Alert was posted as a blog on the Gibson Dunn Securities Regulation and Corporate Governance Monitor, available at https://securitiesregulationmonitor.com. We encourage you to sign up at the Monitor website to receive email alerts when we post information on developments and trends in securities regulation, corporate governance and executive compensation.

Gibson, Dunn & Crutcher's lawyers are available to assist in addressing any questions you may have regarding the issues discussed above. Please contact the Gibson Dunn lawyer with whom you work, or any of the following:
California
Andrew W. Cheng (213-229-7684, acheng@gibsondunn.com)
Linda L. Curtis (213-229-7582, lcurtis@gibsondunn.com)
Michelle Hodges (949-451-3954, mhodges@gibsondunn.com)
Jeff Hudson (213-229-7332, jhudson@gibsondunn.com)
Ari Lanin (310-552-8581, alanin@gibsondunn.com)
Jonathan K. Layne (310-552-8641, jlayne@gibsondunn.com)
David C. Lee (949-451-4069, dlee@gibsondunn.com)
Stewart L. McDowell (415-393-8322, smcdowell@gibsondunn.com)
James J. Moloney (949-451-4343, jmoloney@gibsondunn.com)
Douglas D. Smith (415-393-8390, dsmith@gibsondunn.com)
Peter W. Wardle (213-229-7242, pwardle@gibsondunn.com)

Dallas
Jeffrey A. Chapman (214-698-3120, jchapman@gibsondunn.com)
Robert B. Little (214-698-3260, rlittle@gibsondunn.com)

Denver
Richard M. Russo (303-298-5715, rrusso@gibsondunn.com)
Robyn E. Zolman (303-298-5740, rzolman@gibsondunn.com)

International
Joseph M. Barbeau - Hong Kong (+852-2214-3888, jbarbeau@gibsondunn.com)
Claibourne S. Harrison - London (+44-(0)20-7071-4220, charrison@gibsondunn.com)
Paul Harter - Dubai (+971 (0)4 704 6821, pharter@gibsondunn.com)

New York
J. Alan Bannister (212-351-2310, abannister@gibsondunn.com)
Barbara L. Becker (212-351-4062, bbecker@gibsondunn.com)
Joerg H. Esdorn (212-351-3851, jesdorn@gibsondunn.com)
Andrew L. Fabens (212-351-4034, afabens@gibsondunn.com)
John T. Gaffney (212-351-2626, jgaffney@gibsondunn.com)
Lois F. Herzeca (212-351-2688, lherzeca@gibsondunn.com)
Kevin W. Kelley (212-351-4022, kkelley@gibsondunn.com)
Emad H. Khalil (212-351-2677, ekhalil@gibsondunn.com)
Edwin M. O’Connor (212-351-2445, eoconnor@gibsondunn.com)
Glenn R. Pollner (212-351-2333, gpollner@gibsondunn.com)

Washington, D.C.
Howard B. Adler (202-955-8589, hadler@gibsondunn.com)
Anne Benedict (202-955-8654, abenedict@gibsondunn.com)
Blaise F. Brennan (202-887-3700, bbrennan@gibsondunn.com)
Stephen I. Glover (202-955-8593, siglover@gibsondunn.com)
Amy L. Goodman (202-955-8653, agoodman@gibsondunn.com)